

Federal Communications Commission

FCC 96R-23

FCC MAIL SECTION

May 9 9 28 AM '96
 Before the
 Federal Communications Commission
 Washington, D.C. 20554

DISPATCH

MM Docket No. 94-10

In re Applications of

The Lutheran Church
 Missouri Synod

File Nos. BR-890929VC
 BR-890929VB

For Renewal of Licenses of
 Stations KFUA/KFUA-FM
 Clayton, Missouri

Appearances

Richard R. Zaragoza, Esq., Kathryn R. Schmeltzer, Esq., Barry H. Gottfried, Esq., and Scott R. Flick, Esq., on behalf of The Lutheran Church-Missouri Synod; David E. Honig, Esq., on behalf of the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP, and the St. Louis County Branch of the NAACP; and, Norman Goldstein, Esq., and Robert A. Zauner, Esq., on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: April 23, 1996;

Released: May 3, 1996

By the Review Board: MARINO (Chairman) and GREENE.

Board Chairman MARINO:

1. After a trial-type hearing, Administrative Law Judge Arthur I. Steinberg (ALJ) concluded that Stations KFUA(AM) and KFUA-FM, Clayton, Missouri, violated the Commission's rules governing equal employment opportunities requirements (EEO) and truthful written statements and responses to Commission inquiries. *Initial Decision*, 10 FCC Rcd 9880 ¶¶ 193, 223 (*I.D.*). Nevertheless, considering all of the circumstances, the ALJ found that the public interest would be served by renewing the licenses "subject to EEO reporting conditions, and a forfeiture in the amount of \$50,000...." *Id.* ¶¶ 253, 261, 282. Exceptions to the *I.D.* were filed by the Lutheran Church-Missouri Synod, the licensee of the Stations, and the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP and the St. Louis County Branch of the NAACP (hereafter called Petitioner or NAACP). The Mass Media Bureau supports the sanction fashioned by the ALJ as appropriate and within the range specified by the Commission. Bureau Reply at 18. Oral argument was held on February 9, 1996. Petitioner filed Supplemental Authorities on February 23, 1996, and the licensee filed a Response on March 1. We affirm the ALJ's carefully crafted *I.D.* which is fully supported by his record findings and Commission precedent.

BACKGROUND

2. A broadcaster seeking license renewal must still demonstrate that its "station has served the public interest, convenience and necessity." See Section 309 (k)(1)(A) of the Communications Act of 1934, as amended, 47 U.S.C. § 309 (k)(1)(A); see also *Office of Comm. of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969). Because of the disparity between the public interest standard and discriminatory employment practices by licensees, the Commission adopted EEO rules. See *Nondiscrimination Employ. Practices of Broadcast Licensees*, 18 FCC 2d 240 (1969); see also 47 U.S.C. 151 requiring the Commission to make available communications service "to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex." The current rule, 47 CFR § 73.2080, provides, in pertinent part: (a) "Equal opportunity in employment shall be afforded by all licensees ... of commercially or noncommercially operated AM, FM ... broadcast stations ... to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex"; and (b) "Each broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice." Specific program requirements for implementing a station's equal employment opportunities responsibilities are further set forth in subsections (b) and (c) of the EEO rule.

3. In 1987, the Commission shifted from a result-oriented to an efforts-based approach in assessing a licensee's EEO compliance, "focus[ing] on the station's equal employment opportunity program, its consistent efforts to contact sources likely to refer qualified female and minority applicants, and self-analysis of its outreach program." See *Streamlining Broadcast EEO Rules and Policies*, FCC 96-49, released February 16, 1996, ¶ 7 & nn. 12-15. The objective of such an approach is to increase the pool of qualified female and minority candidates from which a licensee can select the best qualified applicant, without regard to gender, race, or ethnic origin. *Id.* There is no requirement that the proportion of minorities or women employed must equal their presence in the labor force. *Id.* Enforcement of the Commission's equal employment opportunities program must of necessity rely on truthful reporting by its licensees, which historically have been held to high standards of candor. See, e.g., *Dixie Broadcasting, Inc.*, 7 FCC Rcd 5638, 5640 ¶ 12 (1992); *Bilingual Bicultural Coalition v. F.C.C.*, 595 F.2d 621, 635 (D.C. Cir. 1978) ("licensees are well aware of their duty, not only to avoid positive untruths, but to be 'scrupulous in providing complete and meaningful information'"). Religious broadcasters have a limited exemption from the EEO rules for employment "connected with the espousal of the licensee's religious views." *King's Garden, Inc. v. FCC*, 498 F.2d 51, 53 (D.C. Cir. 1974) (upholding Commission's refusal to engraft onto its EEO rules a 1972 Title VII amendment expanding the exemption to cover all activities of religious employers).

4. In this case, Station KFUA(AM), the "world's oldest religious broadcast facility," is a daytime only station that has been operating noncommercially with a religious format since 1924. *I.D.* ¶¶ 6-7. Its companion, Station KFUA(FM), which began operations in 1948, is the only full-time classical music format station in the St. Louis market, and has, since March 1983, one month into its

latest license period, accepted commercial advertising. *Id.* ¶ ¶ 6-7, 17. The studios of both stations are located on the campus of the Lutheran Church Missouri Synod's Concordia Seminary in Clayton and made available on a rent free basis. *Id.* ¶ ¶ 7, 24. The Stations and Seminary have been closely affiliated since the stations' inception, and the seminary students and their spouses have worked at the stations for relatively low salaries as part of their Church's ministry. *Id.* ¶ ¶ 23-24.

5. On September 29, 1989, the Lutheran Church-Missouri Synod (hereafter called the Licensee) filed its renewal applications for the stations covering the license term from February 1, 1983 to February 1, 1990. Additional details about the Licensee's recruitment efforts were requested by the Commission shortly thereafter and the Licensee submitted a supplement on December 29, 1989, which indicated that, during the license term, it "received no minority referrals."

6. On January 2, 1990, the NAACP filed a petition to deny asserting EEO noncompliance and seeking an evidentiary hearing. After four additional Commission letters of inquiry, Licensee responses, and other pleadings related to the petition to deny, the Commission set the applications for hearing on issues relating to (a) the affirmative action provisions of the EEO Rule, and (b) misrepresentation or lack of candor. See *Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture*, 9 FCC Rcd 914 (1994) (*HDO*). Subsequently, the ALJ modified the EEO issue on motion by the NAACP, over the objections of the Licensee and the Bureau, to include the "nondiscrimination" provisions of the rule. See *The Lutheran Church/Missouri Synod*, FCC 94M-191, released March 25, 1994.

7. In ordering a hearing, the Commission followed the Court's admonition that when the "truth [becomes] obscured, rather than revealed, by the mounting pile of papers" concerning pending applications, the Commission should designate those applications for the evidentiary hearing prescribed by 47 U.S.C. § 309(e). *Southwestern Operating Company v. FCC*, 351 F.2d 834, 838 (D.C. Cir. 1965). After a half dozen attempts to ascertain the facts about the Stations' EEO program, the Commission became increasingly troubled by the Licensee's responses, particularly its purported employment requirements of "classical music expertise" and "Lutheran training," which the Commission deemed unacceptable because "[t]hese vague, unascertainable criteria had a direct adverse impact on Blacks." *HDO* ¶ 26. The Commission further questioned the *bona fides* of the criteria because not all persons hired for such specialized positions had these requirements, and no attempt had apparently been made to recruit minorities who possessed such training. *Id.* The Licensee's representations made in the application concerning its recruitment efforts and in its responses concerning job requirements further raised a question "as to whether and to what extent the licensee engaged in misrepresentation or lack of candor" regarding its EEO program. *Id.* ¶ 30; see also ¶ ¶ 27-29. At the hearing, an experienced ALJ listened to five days of testimony, reviewed more than one hundred exhibits and rebuttal exhibits submitted by the parties, and in his *I.D.* made detailed findings of fact and conclusions of law on all relevant issues.

8. Petitioner NAACP urges in its exceptions that the Licensee committed race discrimination and made numerous misrepresentations during the Commission's investigation and subsequent hearing. Brief at 6-13, 13-20. It

contends that the penalty for discrimination or misrepresentation is nonrenewal. *Id.* at 20-25. The Licensee, on the other hand, contends that the record fails to support the ALJ's finding that it lacked candor, that the imposition of the \$50,000 forfeiture was arbitrary and capricious, and that the ALJ's reliance on *King's Garden*, *supra*, was misplaced because that twenty-year old decision is no longer good law. Licensee Brief at 4-14, 15-16, 16-24; Reply at 8-10. Our analysis which follows, discusses the ALJ's findings and conclusions together with the parties' decisional exceptions under three major headings: (a) Compliance With Commission EEO Rules; (b) Misrepresentation or Lack of Candor; and (c) Appropriate Sanctions or Remedies.

COMPLIANCE WITH COMMISSION EEO RULES

9. *Findings.* In his *I.D.*, the ALJ found that the Lutheran Church had a historical commitment against racism and had a continuous outreach towards African American families; that this policy had been extended to its broadcasting ministry; and that the Church's highest officials believed the ministry's policies of nondiscrimination and EEO compliance were being followed at the Stations because the individuals in charge were honest and of the highest integrity. *I.D.* ¶ ¶ 36-48. On the "nondiscrimination" aspect of the issue, the ALJ held that "no individual was discriminated against by the Stations because of race, color, religion, national origin, or sex. There is not one scintilla of evidence in the record to indicate that any adverse discriminatory act ever occurred, or that any individual ever even made an allegation of racial or other discrimination regarding the Stations' employment practices." *Id.* ¶ 194. Prior to the filing of the NAACP's petition to deny, the Licensee had hired one Hispanic female, Caridad Perez, and four African Americans. *Id.* ¶ 196. Ms. Perez was hired for a Top Four job category position, and another African American, Lula Daniels, had also been promoted to a Top Four position, which she held until her death in 1985. *Id.* The Stations had also considered a second African American, Ruth Clerkly, for promotion to a management-level position but she left before the Stations could promote her. *Id.* ¶ ¶ 84, 196.

10. In reaching his conclusion that no adverse discriminatory act had occurred, the ALJ rejected Petitioner's contention that the FM classical music knowledge criterion was an indicator of a discriminatory intent on the part of the Licensee. *Id.* ¶ 197. Although there was no evidence that the Stations discriminated against any particular persons, the ALJ held that the Licensee's hiring practice of giving preferential hiring treatment to individuals with knowledge of the Missouri Synod Lutheran doctrine or to active members of the Lutheran congregation for the positions of reception, secretary, engineer, and business manager did contravene the *King's Garden* limited exemption from the EEO rules because those positions were not reasonably connected with the espousal of the Church's religious views. *Id.* ¶ 200-201.

11. On the affirmative action aspect of the EEO issue, the ALJ initially analyzed the Stations' record from the beginning of the license term in 1983 until 1987. During this initial period, the ALJ concluded that the Stations' affirmative action efforts, though flawed, were in substantial compliance with the then result-oriented Commission review. *I.D.* ¶ 205. Although noting various infirmities, see ¶ ¶ 208-210, the ALJ found that the Stations' minority

representation for the most part was satisfactory since some 15.8% of the full-time hires during that period were minorities and that percentage exceeded the percentage of African Americans living in the relevant market. *Id.* ¶ 211-212. The major source of African American employees during this period was Ms. Daniels, an employee, mentioned in ¶ 9 above.

12. As for the remainder of the license term (August 3, 1987 to February 1, 1990), the ALJ concluded that the Stations' overall "affirmative" efforts were unsatisfactory in the wake of the Commission's 1987 change of emphasis from results to the overall efforts made by a licensee to operate in a nondiscriminatory manner. Particularly, he referred to those formal provisions of the new subsection (c) requiring a station: to disseminate its EEO program to job applicants and employees (47 CFR § 73.2080(c)(1)); use minority and women organizations and other potential sources of minority and female applicants to supply referrals whenever job vacancies are available in its operation (47 CFR § 73.2080(c)(2)); evaluate its employment profile and job turnover against the availability of minorities and women in its recruitment area (47 CFR § 73.2080(c)(3)); and analyze its efforts to recruit, hire, and promote minorities and women and addressing any difficulties encountered in implementing its EEO program. *Id.* ¶ ¶ 213-215.

13. First, he found that with the exception of Thomas M. Lauher, the General Manager of the FM station from May 1987 to July 1989, no management-level employee made any attempt to implement a continuous or consistent EEO program. *Id.* ¶ 218. Lauher had reviewed that station's compliance with the EEO requirements and instituted several reforms to correct prior deficiencies late in the license term. *Id.* ¶ 217. After Lauher left, the responsibility for EEO compliance fell on the Reverend Paul Devantier, the Executive Director of the Church's Board for Communications Services, who served as a liaison to the Stations and acting general manager of the FM station; and on Dennis Stortz, the Operations Manager for both Stations from 1978 to 1991 and acting general manager for both stations from July 1986 to May 1987, but there was no discussion of how the responsibility was to be apportioned and neither individual took any steps to carry out the Stations' EEO Program. *Id.* ¶ 218. Responsibility for the day-to-day operation of the Stations, however, fell on Stortz, who had received copies of letters from the law firm alerting the Licensee to give careful review of its EEO efforts and memoranda prepared by Lauher noting both Stations' EEO shortcomings. Second, until the employment application was corrected by Lauher, prospective employees were given no notice of the Stations' EEO policies, and the employment application in use failed to contain a statement that discrimination was prohibited. *Id.* ¶ 219. On the contrary, the application included a statement whereby the Licensee retained the right to give hiring preferences to Lutherans that was squarely contrary to the Commission's limited *King's Garden* exemption. *Id.* Third, the Stations' efforts to solicit the assistance of likely sources of qualified minority applicants were irregular and generally unsuccessful in attracting minorities to the Stations. *Id.* ¶ 220. Lauher sent general letters to ten university and personnel agency sources indicating an interest in minority or female referrals but those letters did not mention any specific openings, and the Stations did not subsequently contact those organizations when filling nine full-time and five part-time positions. *Id.* Fourth, the Stations failed to for-

mally evaluate their employment profile and job turnover against the availability of minorities and females in their recruitment area. *Id.* ¶ 221. Finally, after Lauher's departure, there was no continuing review of the Stations' job structure or an analysis of the Stations' efforts to recruit and hire minorities. *Id.* ¶ 222.

14. *Discussion.* We will affirm the ALJ's conclusions that the Stations' affirmative action efforts were flawed, but acceptable, for the initial four and one-half years of the license term, and unsatisfactory, and not in compliance with the EEO Rules, for the remainder of the term. We also affirm the ALJ's conclusion that the Licensee did not commit racial discrimination, as charged by Petitioner the NAACP. Initially, Petitioner argues that the "classical music requirement" and other explanations concerning minority hiring were "invented for one purpose: to excuse KFUE's hiring of Whites only for years." Brief at 7. This argument, however, has no factual support and is contradicted by the ALJ's undisputed findings. Peter J. Cleary, founder of the Concert Music Broadcast Sales, an advertising representative firm devoted exclusively to sales of the classical radio format, testified that it was he who initially contacted KFUE-FM and successfully urged the Licensee to change to a commercial operation; that his firm initially acted as KFUE-FM's sales force; and that he advised the Licensee to should look for sales people who could talk credibly about classical music when the station took over its own sales efforts in 1986. *Id.* ¶ ¶ 138-140. The ALJ found that both the Reverend Devantier and Stortz accepted this premise because such salespersons would know their own product. *Id.* ¶ ¶ 141-142. It was only when economic pressures near the end of the license term required the station to settle for people lacking the desired expertise that the thinking about the requirements changed, but, that in any event, no minority applicant was turned away or discouraged from applying for a job because of a lack of classical music expertise; nor was the criterion used as a pretext for discrimination. *Id.* ¶ ¶ 143-144, 197; see also ¶ ¶ 24-26, below.

15. In a related context, the Petitioner argues that the ALJ overruled the *HDO*, which rejected as "inherently discriminatory" a legal argument that the Licensee's recruitment efforts should be excused due to the paucity of minorities in the service area who were interested in classical music. *Id.* at 7. It contends that the ALJ should have confined the instant factual inquiry to the sole question of whether the Licensee made the argument, and if so, denied the applications. *Id.* at n.12. We disagree. The ALJ found that the advancement of the legal argument here did not establish a discriminatory mind-set on the part of the Licensee. We perceive no error on the part of the ALJ, particularly since the alleged mind-set conflicts with the totality of the evidence. See *Florida State Conference of NAACP v. FCC*, 24 F.3d 271, 274 (D.C. Cir. 1994) (submission of explanation to meet the inference of discrimination petitioners sought to draw from statistics does not betray a discriminatory stereotype); and cases cited in *Id.* ¶ 198.

16. Secondly, Petitioner minimizes the significance of the absence of complaints by African Americans, as well as the hiring of African Americans in secretarial positions, and the hiring of other minority groups. *Id.* at 8-9. It argues that discrimination frequently fails to give rise to individual complaints because the victims are unaware of what has been done to them. *Id.* at 8. It further argues that the hiring of other minorities or of African Americans in subordinate positions is hardly evidence that African

Americans would have been considered for responsible positions. *Id.* at 9. Again, this argument does not accurately reflect the record evidence. The ALJ's findings establish, for example, that Ms. Daniels, an African American, was promoted from a secretarial position to that of the Stations' Coordinator of Worship Programming and served in that position until her death in 1985. *I.D.* ¶ 76. She was also part of a network of Lutherans who by word of mouth identified other qualified individuals for positions at the Stations and in fact referred two African Americans to the Stations through contacts at a local parish church. *Id.* Both were hired, as was a third African American. *Id.* ¶ 75. As mentioned previously, one of those individuals, Ms. Clerkly, had been recommended and was being considered for a management-level position at the time she left the station. See ¶ 9 above.

17. Petitioner further claims that the ALJ should have drawn an adverse inference from the statistical record that the Licensee intended to practice discrimination, and that the Stations' failure to comply with an affirmative action plan is further evidence of that intent. Brief at 10-11. These arguments are also without merit. The ALJ's findings show that over the course of the license term, 16.3% of the hires were African Americans or more than 100% of African American representation in the local workforce. *I.D.* ¶ 68; *HDO* n.6. Even excluding the hires after the NAACP filed its petition, 12% of the hires were African Americans or 86% of the African American representation in the workforce. *Id.* As the ALJ notes, "If the Church had been bent on racial discrimination, it is highly unlikely that these African Americans or Hispanic individuals would have filled any positions at the Stations." *Id.* ¶ 196. Additionally, the Commission does not infer deliberate discrimination based solely on deficiencies in a licensee's EEO program. See, e.g. *Holiday Broadcasting Co.*, 11 FCC Rcd 1125 ¶ 5 (1996). In sum, absent evidence, we will not infer deliberate discrimination on the part of the Licensee where an experienced ALJ has had an opportunity to observe witnesses, examined the relevant documentary evidence, and reached a well-reasoned decision. See *WEHR, Inc. v. FCC*, 420 F.2d 158, 162 (D.C. Cir. 1969) (It is for the trier of fact to judge who is biased and who is equivocating).

MISREPRESENTATION OR LACK OF CANDOR

18. Several areas of concern led the Commission to specify a misrepresentation or lack of candor issue. *HDO* ¶ 32. First, there was a discrepancy over the Licensee's number of total hires during the twelve months immediately preceding renewal. *Id.* ¶ 27. Second, it appeared that the Licensee had been less than forthcoming regarding the specifics of its EEO outreach efforts. *Id.* ¶ 28. Thus, it had stated in the renewal applications that "it recruited for vacancies as they occurred and that they actively sought female and minority referrals"; however, their subsequent responses indicated that only 11 of 32 jobs during the three-year period "received recruitment and that minority specific sources were used principally in the last three months of the license term for only lower-level positions." *Id.* ¶ 29. Third, the renewal applications were silent regarding a purported financial agreement the Licensee had with the Concordia Seminary to hire seminary students or their spouses, as well as the purported job requirements of Lutheran and classical music training. *Id.* ¶ 29. Finally, it appeared that the Licensee had misrepresented the classical music requirement at the FM station because "the record

failed to demonstrate that all, or even most, sales persons hired during the license term met that requirement." *Id.* ¶ 30.

19. After making detailed findings regarding the Commission's concerns, the ALJ resolved several aspects of the issue in favor of the Licensee, concluding that the Licensee did not deliberately misrepresent its hiring numbers, or lack candor by not including information in its renewal applications regarding its hiring arrangements with the Concordia Seminary or the job requirements for knowledge of the Lutheran doctrine or classical music training. *Id.* ¶ ¶ 224-229, 239-241, 242-245. We will affirm the ALJ on these matters which have not been undermined by the exceptions.

20. The ALJ found, however, that the Licensee lacked candor in two areas. First, he held that the Licensee lacked candor in describing the Station's recruitment program in its renewal applications. *Id.* ¶ 223. The recruitment program read:

[1] When vacancies occur, it is the policy of KFUD and KFUD-FM to seek out qualified minority and female applicants. [2] We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex. [3] We contact the various employment services and actively seek female and minority referrals and we specifically request them to provide us with qualified female and minority referrals. [4] See sample reply form attached.

Id. ¶ 230. This description was characterized by the ALJ as "highly misleading." *Id.* The Licensee excepts to the finding, contending that in context the description is truthful. Thus, with respect to the first sentence, it claims that the Broadcast Equal Employment Opportunity Program Report, FCC Form 396, is flawed, most noticeably, in "that the form does not specify the time period to which it applies." Brief at 7. It argues that the form "does not ask about a station's entire seven year license term recruitment efforts, and that Stortz included the sentence because it was generally true at the time the renewal applications [were] completed [i.e., September 1989]," referring to Lauher's recruitment letters sent to the ten university and personal agency sources only two months earlier, and the use of referral sources for four of the five positions that opened up after the renewals were filed. Brief at 8-9. It contends that the second sentence simply meant that it did not use any employment services which discriminates and that sentences three and four together state only that sample forms were used. *Id.* at 10-11.

21. We agree with the ALJ that the recruitment description was grossly misleading when compared to the specific questions called for by the FCC Form 396, then in use (expiration 9/30/90). Counsel's argument that the "flawed" nature of the form should be considered in evaluating the recruitment statement is totally without merit because, in fact, the Stations did not use the form or specifically respond to its questions. Page three of the form explicitly directed the licensee to indicate which of certain enumerated hiring practices the stations followed during the previous 12 months [October 1, 1988 to September 30, 1989] in making efforts to attract qualified minority and women applicants whenever vacancies occurred. Under those enumerated practices, the licensee was asked to iden-

tify the names of the media, educational institutions (including colleges with minority and women enrollments), and minority and women's organizations contacted during the previous twelve months, and to specify the total numbers of minority and women referrals, respectively, for each source category, as well as the number of referrals obtained from employees. Had the Licensee fully responded to the factual questions in the form, its defective recruitment efforts would have been revealed in the beginning. See *Eagle Radio, Inc.*, 9 FCC Rcd 836, 844 ¶ 18 (1994) (Commission has repeatedly stated that licensees must engage in recruitment efforts with regard to all of their hiring vacancies). The Commission's pre-hearing investigation later established that for the last three years of the license term, the Licensee had not recruited for 50% of the AM vacancies and 78% of the FM positions, nor had it used any minority specific source but for one of its vacancies. *HDO* ¶ ¶ 23, 25.

22. Instead of using pages 3-5 of the Form 396, the Licensee, under Stortz's supervision and after review by counsel, substituted its own narrative statement which the ALJ correctly found conveyed the impression the Stations had adopted a model program and sought out qualified minority and female applicants on a regular basis from sources likely to refer such applicants. *I.D.* ¶ ¶ 231-234. The substituted material included the misleading representation quoted above; and a general statement concerning the effectiveness of its affirmative action plan "[that the Stations] have long been committed to Equal Employment Opportunity and will continue to act affirmatively to maintain that commitment." Licensee Exh. 4, Att. 16. Additionally, attachment of the "sample reply form" without also submitting the letter soliciting the reply, significantly buttressed that impression, as the ALJ found. At the hearing, it was established that following the death of Ms. Daniels in 1985, and the Commission's emphasis on recruitment efforts in 1987, the Licensee's EEO program had fallen into noncompliance, and only late in the license term did Lauher attempt to remedy some of its deficiencies from the Fall of 1988 until April 1989. *I.D.* ¶ ¶ 93-105.

23. The Commission cannot effectively assess a licensee's compliance with the EEO rules where the licensee is less than "scrupulous in providing complete and meaningful information." *Bilingual, supra*. The Licensee argues, however, that a lack of candor requires an intent to deceive, and that in this case, the inference drawn by the ALJ that Stortz had a motive to deceive and intended to create an erroneous impression of the Station's actual recruitment effort is inconsistent with the ALJ's subsequent demeanor findings that "Mr. Stortz testified truthfully at the hearing, even when that testimony was likely to have an adverse effect on the Church's case." *I.D.* ¶ ¶ 237-238, 259. In affirming the ALJ's ultimate conclusion, we do not need to precisely divine Stortz's mental state of mind at the time of the renewal filings. Where, as here, a licensee displays a continued pattern of indifference to Commission requirements resulting in the Licensee's submitting untruthful answers to Commission forms or inquires, that behavior rises to the level of a lack of candor even if Stortz did not deliberately intend to subvert the Commission's processes.

24. Except for Lauher's attempts during his brief tenure at the FM station, the Licensee never implemented an EEO program that fully complied with the Commission's detailed EEO requirements, relying mainly for its minority candidates from word of mouth employee referrals. Stortz, the individual responsible for the day-to-day operation of

the Stations' EEO policies following Lauher's departure, received copies of letters sent by the Licensee's law firm strongly cautioning the Stations to "utilize both female and minority recruitment sources for each job opening at the station" and urging Stortz to give the EEO area of operations "a careful review." NAACP Exh. 47; Bureau Exh. 22. Stortz also received Lauher's memorandum relating to both the AM and FM stations warning that "Numbers do not work anymore ... Now the FCC looks for affirmative action based on the EEO program model currently on file as developed by the station. The question is: Is the station following its own plan?" *I.D.* ¶ 99. Lauher had also advised: "We are taking action now to address specific concerns ... Failure to do so could create significant jeopardy in license retention. If the concerns are not addressed quickly, the worst possible consequences is loss of license." *Id.* ¶ 98. Finally, the Form 396 highlighted what the Commission expected from the Licensee. As the *HDO* indicated: "without the challenge to its renewal applications, the licensee's true EEO program and policies might not have been ascertained." *HDO* ¶ 29. It was only after several inquiries and a trial-type hearing that the Licensee's true EEO performance was on the record. The Licensee's pattern of indifference to the Commission's EEO requirements, including the information about the Stations' actual EEO program expected as part of the renewal process, resulted in information not reflective of the truth and therefore is tantamount to a lack of candor. *I.D.* n.24; Cf. *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1106 (1978) (callous carelessness in disregard of licensee's obligations to the Commission equivalent to a deliberate intent); *Fifteen Annual Report of Federal Communications Commission* at 16 (discussing *per curiam* decision by Supreme Court in *FCC v. Broadcasting Service Organization, Inc.*, 337 U.S. 901 (1949), that reckless indifference to the responsibilities of a licensee warranting nonrenewal could be inferred despite the alleged absence of direct evidence of intent to deceive).

25. The second lack of candor found by the ALJ concerned the Licensee's response that knowledge of classical music was a "requirement" at the FM station. In its Opposition to the NAACP Petition to Deny and in a Motion to Strike and Reply to Comments, the Licensee had responded that classical music knowledge was a requirement for the sales person positions. *Id.* ¶ 246. Stortz submitted a memorandum to former counsel stating that "KFUO-FM's format is Classical," with many of its positions requiring a knowledge of classical music " *Id.* n.26 (italics added by the ALJ). Counsel had solicited the information to fashion an argument urging the Commission to employ alternative data to the labor force statistics in judging the results of the FM stations' recruitment efforts. *Id.* ¶ 247. Her law firm had used a similar argument in another EEO case involving a classical music licensee. The record findings, however, reflected that "classical music knowledge, although desirable, was not a requirement for a sales position," and that "only 8 of the 15 individuals hired for the position of Sales Worker during the license term had some classical music background or experience." *Id.* ¶ 248. Although counsel was unaware that the FM station had hired sales workers without such knowledge, the ALJ found that Stortz knew that classical music knowledge was not an absolute requirement. *Id.* ¶ 250. He concluded, therefore, that, from all of the circumstances, Stortz must have intended to mislead since he permitted the Licensee to represent to the Commission "on two occasions, that it was [a

job requirement]." *Id.* "By concealing the complete facts, by failing to be fully forthcoming and informative, the [Licensee] lacked candor." *Id.*

26. The Licensee contends "there is no justification for the harsh conclusions on this matter reached by the Judge." Brief at 11. It argues that former counsel, rather than Stortz, first suggested the argument in which the word "requirement" was used, that it was also she who initially used the word "requirement" in advising Stortz, and that she was intimately involved in drafting the statements. *Id.* at 12. Although Licensee's counsel subsequently learned that the FM station had hired salespeople without knowledge of classical music when necessary, she testified that she believed her argument was still valid because it was difficult to find people with such backgrounds. *I.D.* ¶¶ 160-161. The Licensee argues that since both counsel and Stortz testified that there was no intent to mislead and that counsel regrets that she did not use another word than "requirement," the issue here is whether Stortz should have second-guessed the Licensee's attorney on the phraseology used. Brief at 12-13. It asserts that there is no evidence that Stortz intended to withhold relevant information. The ALJ rejected the argument that the use of the word "requirement," rather than a less absolute word such as "preferred," was a matter of semantics. He found that the Licensee also represented that the jobs in question "can only be filled" by persons with classical music expertise or that certain employees "must have" specialized skills. *I.D.* ¶ 251. He reasoned that the use of a word such as "preferred" for "requirement" would have seriously weakened the Licensee's argument.

27. It is black-letter law that an applicant cannot simply acquiesce in representations made to the Commission by counsel that the applicant knows are incorrect or misleading, see *James C. Sliger*, 70 FCC 2d 1565, 1572-1573 (Rev. Bd. 1979), or immunize itself from sanctions merely because it follows advice of counsel, see *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). We recognize, however, that because the critical word was embedded in and essential to a pre-conceived legal argument contrived by counsel, a laymen may not have fully appreciated the significance of its use. See *Fox Television Stations, Inc.*, 77 RR 2d 1003, 1066 ¶ 68. This point does not have to be finally resolved here because as we explained below, the lack of candor which we have affirmed was sufficiently serious to justify the ALJ's action.

APPROPRIATE SANCTIONS OR REMEDIES

28. Denial of the renewal applications, the ALJ held, would not be appropriate for the EEO derelictions "because the imposition of such a draconian sanction would be contrary to all precedents in which the Commission has even remotely considered similar factual situations." *I.D.* ¶ 256. Reporting requirements were imposed on the Licensee for its noncompliance with the Commission's EEO program requirements during the latter part of the license term, and for its preferential hiring treatment for positions that were not reasonably connected with the espousal of the Licensee's religious views in violation of the *King's Garden* limited exemption. *Id.* ¶ 253. The ALJ also declined to deny renewal for lack of candor because, in his view, only Stortz was at fault; none of the higher officials had prior knowledge of the misconduct and their testimony, which was "entirely credible," revealed genuine embarrassment and sincere contrition; and Stortz testified

truthfully at the hearing even when that testimony was detrimental to the Licensee's case. *Id.* ¶ 259. Additionally, the Licensee's spotless record during some seventy years convinced the ALJ that the misconduct in this case "may be seen as an isolated occurrence, an aberration, confined to a single Commission investigation." *Id.* ¶ 260. He imposed a \$50,000 forfeiture and observed that the Commission's focus in assessing the sanction for this type of violation is the predictive value such misconduct has with respect to a licensee's future truthfulness and reliability, and that the Commission considers the willfulness of the misconduct, its frequency, and the licensee's overall record of compliance in making this assessment. *Id.* ¶¶ 257-258. Based on the entire record, he concluded that it was "highly unlikely ... that the [Licensee] will deal with the Commission in the future in anything less than a fully forthright, candid, and truthful manner." *Id.* ¶ 259.

29. The Licensee disagrees that any sanctions should have been imposed and argues that the Board should conclude that its stations "substantially complied with the Commission's EEO Rule and policies during the entire License Term." Brief at 25. The factual record, however, as accurately reflected in the ALJ's findings, which are not disputed, compels the conclusion that the Stations were not in substantial compliance with the Commission's EEO requirements during the latter part of the license term. Lauher sought to remedy many of the EEO derelictions late in the license term, but his departure marked the end of any meaningful effort until the licensee's renewals were challenged by Petitioner.

30. Petitioner NAACP urges that the appropriate "penalty for discrimination or misrepresentation is nonrenewal." Brief at 20-25. To the extent that petitioner relies on its contention that the Licensee "committed race discrimination," the Board has already affirmed the ALJ's *I.D.* on this point. See ¶ 14-17, above. Briefly, we agree with the ALJ that the history of the Lutheran Church and Missouri Synod demonstrates an aggressive attitude against racism, and a continuous outreach toward African American families, including creating a Commission on Black Ministry that was designed to expand the Church's African American membership; and that this policy was applicable to the radio stations. We also agree that, other than Lauher during his brief tenure, the individuals in charge of the stations simply did not develop the mechanics necessary for a sound affirmative action program, and indeed appeared indifferent to implementing such a program. The Licensee did not rebuff Lauher for his efforts; it simply did not continue these reforms after he left. However, although the Licensee was deficient in its EEO performance, there is nothing in the record to suggest that these deficiencies grew out of an intent to discriminate against minorities or women. We therefore agree that the record supports the ALJ's conclusion that nonrenewal for the EEO violations revealed by the record in this case would constitute an unjustified sanction unsupported by controlling Commission precedent. See, e.g., *Texas Coast Broadcasters, Inc.*, 11 FCC Rcd 1688, 1689 ¶ 8 (1996).

31. The lack of candor about the Stations' EEO program raises a much more serious and troublesome problem. Where the record has supported a finding that a "cover up" has continued into the hearing, we have not hesitated to deny renewal. See, e.g., *Center for the Study and Application of Black Economic Development*, 10 FCC Rcd 2836 ¶ 6 (Rev. Bd. 1995) (subsequent history omitted). Here, the ALJ found that the Licensee's witnesses, including Stortz,

testified truthfully at the hearing and can be expected in the future to deal with the Commission in a fully forthright, candid, and truthful manner. *I.D.* ¶¶ 259-260. On exceptions, we review "a cold record - devoid of emotion and full contextual impact," and because the ALJ is the only adjudicative official "to observe the witnesses - sift testimony taking account of emphasis, innuendo or evasion," his credibility findings are by law and common sense entitled to considerable deference. *WEHR*, *supra*, 420 F.2d at 162; see also *Ramon Rodriguez and Associates Inc.*, 9 FCC Rcd 3275 ¶ 43 (Rev. Bd. 1994) (subsequent history omitted). An ALJ's credibility findings may not be ignored by the Board unless reversal is supported by substantial evidence. *WHW Enterprise, Inc. v. FCC*, 753 F.2d 1132, 1141-42 (D.C. Cir. 1985). That evidence has not been manifested in this case; on the contrary, our review has established that the ALJ's findings are supported by a solid preponderance of the evidence marshalled in his comprehensive *I.D.* While the Licensee's indifference to the Commission's EEO requirements resulted in the candor problem before us, we agree with the ALJ that the Commission can expect the Licensee to be forthright, candid, and truthful in its future dealings with the Commission. Therefore, we conclude that a forfeiture rather than denial of renewal is the appropriate sanction.

32. We are mindful of Petitioner's additional request (Oral Arg. Tr. 1132-1133) that, if the Board does not deny renewal on the present record, the case should be remanded to the ALJ for a further hearing because of erroneous procedural and evidentiary rulings. We have carefully reviewed its contentions and have concluded that the ALJ did not abuse his discretion, or commit substantial or prejudicial error, in conducting the hearing. These matters are not decisional for the reasons fully set out by the ALJ and the parties. *I.D.* ¶¶ 262-281; Bureau Reply at 12-21, 15-18; Licensee Reply at 15-22.

33. Finally, we concur with the ALJ that the reporting conditions imposed on the Licensee would:

afford the Stations the opportunity to design and put into practice an EEO program which is fully consistent with all aspects of the Commission's rules and policies. They will also enable the Commission to review the Station's EEO program periodically to ensure that it is being utilized on a consistent, continuing, and systematic basis. The necessity for the [conditions] is manifested by the fact that, throughout the License Term, the Stations' former legal counsel kept the Stations apprized of developments in the Commission's EEO rules and policies, often emphasizing the seriousness with which the Commission viewed EEO matters. However, with the exception of Mr. Lauher, there is no evidence that any management-level employee of the Stations ever heeded former counsel's advice and admonishments. Therefore, there appears to be a need for a formal mechanism to monitor the Stations' EEO compliance efforts.

Id. ¶ 253.

34. The Commission has also issued short-term renewals in cases involving similar violations of the EEO rules, see *Eagle Radio*, *supra*, 9 FCC Rcd at 854-856, and we conclude that a comparable sanction is applicable here even though the regular renewal applications are now due to be filed in September 1996. (The Commission has recently issued a *Notice of Proposed Rule Making*, FCC 96-169,

released April 12, 1996, to implement new statutory provisions regarding broadcast license terms, see 47 U.S.C. § 307 (c), as amended by § 203 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 112 (1996), and is seeking comment on a proposal to extend the license term to eight years). We modify the ALJ's ordering clause to specify that the renewals are granted for a short term, ending on January 1, 1997, subject to the EEO reporting conditions specified in the *I.D.*, which we affirm.

35. *Miscellaneous.* In its limited exceptions, the Licensee advances two legal arguments which if presented in response to the Commission's pre-hearing investigation, or in response to the *HDO*, might have obviated the need for a hearing. First, Counsel for the Licensee argues that, even if we affirm the lack of candor finding, "the *I.D.*'s imposition of a \$50,000 fine against the Church is statutorily precluded and not supported by applicable case precedent." Brief at 15. It argues that the Commission was bound by the three-year limitation in the 1978 version of Section 503(b)(6) of the Communications Act, "with respect to this case and lacked authority on January 1, 1994 to propose a fine for activity that occurred five years earlier." *Id.* This argument is directed at the Commission's *Notice of Opportunity for Hearing for Forfeiture*, *supra*, adopted January 31, 1994, more than two years ago. The legal propriety of the forfeiture notice is a matter outside the Board's jurisdiction. *Frank H. Yemm*, 39 RR 2d 1657 (1977). It also appears that the argument was not made before the ALJ and may come too late. See *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941), and *Roberts v. College of the Desert*, 870 F.2d 1411, 1414 (9th Cir. 1988) (three-year statute of limitation is an affirmative defense which can not be raised for the first time on appeal).

36. Moreover, we concur with the Bureau that "the lack of candor in a filing with the Commission is a continuing violation which does not end until it is corrected." Bureau Brief at 7. The misleading statement about the Stations' EEO record filed with the September 1989 renewal applications was not corrected until truthful testimony was given at the hearings in June of 1994. Thus, the forfeiture notice was issued within the three year statute of limitation. And the \$50,000 forfeiture for willful and repeated violation of § 73.1015 was well "within the discretion of the Presiding Judge to whom the Commission granted the authority to impose a forfeiture in the amount not to exceed \$250,000." Bureau Reply at 7 and n.3.

37. The final legal argument advanced on behalf of the Licensee is directed at the Commission's limited exemption for religious broadcasters upheld in *King's Garden*. That 20-year old decision, we are told, is simply no longer good law because of an almost 10-year old decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saint v. Amos*, 483 U.S. 327 (1987). Brief at 16-24. *King's Garden* is also allegedly in conflict with the First and Fifth Amendments, the Congressional policy set out in the 1972 amendment to Section 702 of the Civil Rights Act of 1964, and the *Religious Freedom Restoration Act of 1993*, 42 U.S.C. 2000bb-1, but Counsel does acknowledge that in the *Restoration Act*, Congress codified a 1963 precedent, which was in existence at the time of the *King's Garden* decision. Brief at 20. Again, this is an argument directed at the Commission's *HDO* ¶ 26 (invoking the *King's Garden* policy), which the Board is not authorized to modify. See ¶ 35 above.

38. ACCORDINGLY, IT IS ORDERED, That the applications of the Lutheran Church-Missouri Synod, for renewal of licenses of Stations KFUE(AM) and KFUE-FM, Clayton, Missouri, ARE GRANTED for a short term ending January 1, 1997, subject to the EEO reporting conditions specified in the ALJ's *Initial Decision*, 10 FCC Rcd 9921-9922; and

39. IT IS FURTHER ORDERED, That, pursuant to Section 503(b) of the Communications Act of 1934, as amended, this *Decision* and the *Initial Decision*, which we have affirmed, SHALL CONSTITUTE an Order of Forfeiture in the amount of \$50,000;

40. IT IS FURTHER ORDERED, That, within thirty (30) days after this *Decision* becomes final, The Lutheran Church-Missouri Synod SHALL PAY the full amount of the forfeiture by check or money order made payable to "Federal Communications Commission." The remittance should identify the payor, be marked "NAL Control FCC 94-23; NOF Control No. FCC 96R-23, affirming FCC 95D-11," and sent to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

ADDITIONAL VIEWS OF BOARD CHAIRMAN

Petitioner NAACP and the Lutheran Church, two remarkable institutions, have expended considerable resources litigating this case. In the beginning a better road was available. Luke 12:58. Six years later the controversy continues to smolder because of a new constitutional argument belatedly raised during the hearing. See ¶ 37, above. At the prehearing investigation the Licensee represented that "its hiring practices are consistent with *King's Garden*". HDO ¶ 21; and I.D. ¶ ¶ 111-116. When the other litigants started testing the facts, its counsel countered with the new constitutional argument.

This is the latest legal stratagem complicating the basic question of the Licensee's good faith compliance with the EEO rules. See ¶ ¶ 25-27, above. Several Federal cases recognize that the Commission simply does not have to play games with its licensees. See *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941); *Brandywine Maine Line Inc. v. FCC*, 473 F.2d 16, 46-47 (D.C. Cir. 1972), cert. denied, 412 U.S. 922 (1973). "While [the parties] are free to continue this litigation, they can also attempt to settle their differences. And... settlements can serve both private and public interests." See *Faith Center, Inc.*, 92 FCC 2d 1255, 1261 ¶ 17 (Rev. Bd. 1983), citing Conference Report, No. 97-765, 97 Cong. 2d sess. 49-50; Matthew 5:22-26.